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IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

No. 241

ESTATE OF LOUIS SOLOWEY, by LILLIAN HALPERN, LOUIS SHAPIRO and BESSIE SOLOWEY, Executors, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States.

The executors of the Estate of Louis Solowey, petitioners pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals For the Second Circuit, affirming the decision of the Tax Court (15 T. C. 188), holding that there is a deficiency in Federal estate taxes of $30,544.98, against the estate of deceased, Louis Solowey, who died August 4, 1946.

The Tax Court held that property not owned by deceased on date of death was includible for Federal estate tax in the return filed by the estate.

Petition of taxpayer filed in the Tax Court alleged that the property sought to be included for tax was not the property of the decedent on date of death. Appendix to Brief, pages 3 and 4, paragraphs (5) (A) and (5) (B).

Stipulations of Fact agreed to by counsel set out in Appendix to Brief page 16, paragraph (7), that—

> "(7) Subsequent to dates of said assignments, and each of them, decedent retained no incidents of ownership therein. Prior to the dates of said assignments, decedent owned all the incidents of ownership in said policies and each of them."

OPINIONS BELOW.

The opinion of the Tax Court appears in Appendix to Brief page 18. (15 T. C. 188). The opinion of the United States Court of Appeals for the Second Circuit was handed down June 25, 1951, as follows:

> PER CURIAM.
>
> Decision affirmed on opinion below. 15 T. C. 188.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254, and Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948, (80th Congress, Second Session, 1948, Vol. 62, part 1, 991). Also Rule 38 of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. Whether property not owned by decedent on date of death is includible for Federal estate tax purposes in the tax return filed on behalf of the estate of deceased.

2. Whether property owned by living persons absolutely, without any interest therein by decedent or his estate may arbitrarily and illegally be included for Federal estate tax in the tax return of decedent.

STATUTES INVOLVED.

The statutes involved are set out in appendix attached to this petition and brief.

The statutes are chapter 3, Estate Tax, "Vol. 53, Part 1, U. S. Statutes at Large, 76th Congress, First Session," and amendment to the insurance provisions of Section 811(g), enacted as "Section 404, Proceeds of Life Insurance" (Revenue Act of 1942, Title IV, Part 1, enacted October 21, 1942)," which is set out in appendix attached hereto.

Gift Tax Statute, Vol. 53, Part I, U. S. Statutes at Large, 76 Congress, First Session.

STATEMENT.

Louis Solowey, during the years 1927 through 1930, purchased eight policies of insurance, and paid premiums thereon until the years 1944 and 1945. During the years 1944 and 1945, he assigned the policies to his wife and daughters. The cash surrender value on the dates of the assignments was $48,418.56. Appendix to brief pages 14, 15 and 16. All premiums subsequent to the assignments in the years 1944 and 1945 were paid by the assignees. Appendix to brief page 16. Decedent held no interest in the policies after the assignments. Appendix to brief page 16, paragraph 7.

Because of the absolute assignments by the insured of all rights and interest therein, he was required under the Gift Tax Statute to file a gift tax return and pay a gift tax, as the transfers were complete and final. Gift Tax return was filed and tax paid. Appendix to brief page 17, paragraph 10. The property was owned by the decedent prior to the assignments. His ownership of the property made

it subject to a tax under the law after the transfers. See Appendix to brief page 17.

There was no question that the property was owned by Louis Solowey prior to the years 1944 and 1945. Did Solowey on date of death August 4, 1946, own the property? If he owned the property on date of death, by what means was he re-invested with all rights, property and title in the policies?

After the death of Louis Solowey, August 14, 1946, the taxing authorities have taken the position that because of the payment of premiums by decedent before the assignment, of $80,954.31, regardless of payments by the assignees subsequent thereto of $7,116.90, the amount of $105,628.87 was the property of decedent on date of death, and the amount of $10,306.61 was the property of the assignees. The amount of $105,628.87 was added to the decedent's estate as property passing by death to the assignees, the amount added was reached by a "MATHEMATICAL FORMULA," and includible as property belonging to the decedent on date of death, under the statute as amended by Section 404.

REASONS FOR THE ALLOWANCE OF THE WRIT.

The United States Court of Appeals for the Second Circuit and the Tax Court ignored entirely the question of ownership of the property under the Federal estate tax statute. The conclusions reached by the Courts are not justified and are in conflict with prior decisions of this Court in the following cases:

Goldstone v. *U. S.*, 325 U. S. 687, 693.
Magoun v. *Ill. Trust Co.*, 170 U. S. 283.
Knowlton v. *Moore*, 178 U. S. 41.
Church v. *U. S.*, 335 U. S. 632, 646, 656.
Fernandez v. *Weiner*, 326 U. S. 340, and other cases.

The problem is one which affects many taxpayers similarly circumstanced in payment of taxes under unlawful demands by the taxing authorities. Rule 38 of The Revised Rules of the Supreme Court of the United States.

PRAYER FOR THE ISSUANCE OF THE WRIT.

Wherefore, the petition prays that this Court issue its writ of certiorari directed to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings in the cause numbered 21,958 and entitled in said Court, Estate of Louis Solowey, et al v. Commissioner of Internal Revenue, to the ends that said cause may be reviewed by this Court as provided by law, that said decision of said Circuit Court of Appeals be reversed and that your petitioners have such other and further relief in the premises as may seem just.

Dated, Washington, D. C.
Aug. 14, 1951.

E. PAUL YASELLI,
Attorney for Petitioners.

ALFRED CERCEO,
Of Counsel,

Certificate of Counsel.

The foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, is well founded in point of fact and law, is presented in good faith, and is not interposed for delay.

Dated, Washington, D. C.
Aug. 14, 1951.

E. PAUL YASELLI,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The inclusion of the property of the assignees for Federal estate tax and admitted not to be the property of decedent on date of death, Appendix page 16, paragraph 7, is violative of the Constitutional Rights of assignees.

A void judgment or order is remediable on appeal. *Moran* v. *Moran,* 160 F(2) 925. A void statute is considered as never having been enacted, "* * * the question is of fundamental error cognizant without the constitutionality of the statute having been pleaded and without assignment of error." *Houston Lighting & Power Co.* v. *Jenkins,* 5 S. W. (2) 1030, 1032.

FEDERAL ESTATE TAX.

That the Federal estate tax is neither a property nor a legacy tax is beyond peradventure of a doubt. The Courts and the Treasury Department have so held repeatedly. Regulations 37, 68, 70, 80 and 105. On Form 706 (United States Estate Tax Return) Revised October 1950, the statement that, "Federal estate tax is neither a property nor an inheritance tax. It is imposed upon the transfer of the entire net estate and not upon any particular legacy, devise or distributive share," is found.

WHEN IS FEDERAL ESTATE TAX APPLICABLE.

It is no longer a debatable question that the Federal estate tax is applicable only on transfers of property; release of rights to property by death of the owner; or transfers in contemplation of death. The assignee did not receive the property through or because of the death of the decedent Louis Solowey.

Many court decisions have stated the principle simply, as to the taxable incident, for Federal estate tax. Mr. Justice White in *Knowlton* v. *Moore,* 178 U. S. 41, stated the principle in language as follows:

> " * * * What it taxes is not interest to which some person succeeds on a death, the interest which ceased by reason of death."

Mr. Justice Jackson, summarized it in this manner in the case of *Church* v. *Comm.*, 335 U. S. 632, 646. " * * * Death of the transferor perfects the right of the transferee and cuts off any possibility of reverter to the transferor."

It might be contended that Mr. Chief Justice Stone, in the case of *Fernandez* v. *Wiener*, 326 U. S. 340, at page 352, extended the theory of taxability beyond transfer at death. However, an examination of the language used removes all doubt, because the Chief Justice stated that the transfers must be occasioned by death.

Fernandez v. *Wiener, et al*, 326 U. S. 340, Mr. Chief Justice Stone, at page 352, stated:

> "It is true that the estate tax as originally devised and constitutionally supported was a tax upon transfers. Knowlton v. Moore, 178 U. S. 41; Y. M. C. A. v. Davis, 264 U. S. 47, 50. But the power of Congress to impose death taxes is not limited to the taxation of transfers at death. *It extends* to the *creation, exercise, acquisition*, or *relinquishment of any power* or *legal privilege* which is incident to the *ownership of property*, and when any of *these is occasioned by death*, it may as readily be the subject of the federal tax as the transfer of the property at death. See Bromley v. McCaughn, 280 U. S. 124, 135, et seq.

The death of the decedent, Louis Solowey, did not increase the rights of ownership in the policies in the assignees, they had all and everything before death, and full and complete power of disposition of the property.

PROGRESSIVE RATES OF TAX.

Section 810, Rate of Tax is made applicable only to the "transfer of the net estate of every decedent * * * . Section 811(a) of the statute provides for the taxing of

transfers of property only at death. The taxing of any property not passing because of death, and property not owned by the decedent on the date of death is unconstitutional and beyond the power of Congress to tax.

CONCLUSION.

This petition presents constitutional issues and differences in the interpretation of the Federal estate tax statute, between the decisions of this Court and the decision of the United States Court of Appeals for the Second Circuit and its concurrence with the Tax Court. The proposed deficiency by the Tax Court and its affirmance by the United States Court of Appeals for the Second Circuit, denies due process to petitioners and all taxpayers similarly situated.

The petition for a Writ of Certiorari to the United States Court of Appeals for The Second Circuit should be granted and, upon a full hearing, the decision should be reversed.

Respectfully submitted,

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Dated, Washington, D. C.
July , 1951.

Alfred Cerceo
Of Counsel.

INTERNAL REVENUE CODE 1939.

Printed as Vol. 53, Part 1, U. S. Statutes at Large, 76th Congress, First Session

CHAPTER 3—ESTATE TAX
SUBCHAPTER A—BASIC ESTATE TAX

Part 1—Introductory Provisions.

Sec. 800. Application of Subchapter.

The provisions of this subchapter shall apply only to estates of decedents dying after the date of the enactment of this title. Estate taxes in the case of decedents dying on or prior to the date of the enactment of this title shall not be affected by the provisions of this subchapter, but shall remain subject to the applicable provisions of the Revenue Act of 1926 and prior revenue acts, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1926.

Sec. 801. Classification of Provisions.

The provisions of this subchapter are herein classified and designated as—

Part I—Introductory provisions.
Part II—Citizens or residents of the United States.
Part III—Nonresidents not citizens of the United States.
Part IV—Supplemental provisions.

Sec. 802. Application of parts.

Part II shall apply to the estates of citizens or residents of the United States and, except as otherwise provided, to the estates of nonresidents not citizens of the United States, subject to the exceptions and additional provisions contained in Part III. Part IV shall apply to the estates both of citizens or residents of the United States and nonresidents not citizens of the United States.

Part II—Estates of Citizens or Residents of the United States.

Subpart 1—Computation of Tax.

Sec. 810. Rate of Tax.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the *transfer of the net estate* of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title.

* * *

Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) Decedent's Interest—*To the extent of the interest therein* of the decedent at the time of his death.

(b) Dower or Courtesy Interests.—To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) Transfers in Contemplation or, or taking effected at death.

* * *

(d) Revocable Transfers—

* * *

(e) Joint Interest—

* * *

(f) Property passing under general powers of Appointment—

* * *

(g) Proceeds of Life Insurance—

(Section (g) of the Act was amended under date of October 1942 changing the insurance provisions of the statute in the following manner.)

Sec. 404. Proceeds of Life Insurance (Revenue Act of 1942, Title IV, Part 1, Enacted October 21, 1942)

"(a) General Rule. Section 811 (g) (relating to life insurance) is amended to read as follows:

"(g) Proceeds of life Insurance.

"(1) Receivable by the Executor. To the extent of the amount Receivable by the executor as insurance under policies upon the life of decedent.

"(2) *Receivable by other Beneficiaries.* To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (a) of this paragraph, if the decedent, transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of Clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

Chapter 4—Gift Tax

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non resident of property by gift. * * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and

whether the property is real or personal, tangible or intangible;

* * *

Sec. 1005. Gifts made in property.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

* * *

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 241

ESTATE OF LOUIS SOLOWEY, BY LILLIAN HALPERN, LOUIS SHAPIRO AND BESSIE SOLOWEY, EXECUTORS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 24) is reported at 189 F. 2d 968. The opinion of the Tax Court (R. 18–20) is reported at 15 T. C. 188.

JURISDICTION

The judgment of the Court of Appeals (R. 24–25) was entered on June 25, 1951. The petition for a writ of certiorari was filed on August 14, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, under Section 811 (g) of the Internal Revenue Code, the inclusion as a part of decedent's gross estate of that proportion of the proceeds of life-insurance policies taken out by him on his own life which the premiums paid by him bore to the total premiums paid was proper, where all the incidents of ownership had been transferred to the beneficiaries during the decedent's lifetime and premiums were thereafter paid by them.

STATUTES AND REGULATIONS INVOLVED

The pertinent parts of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 11–13.

STATEMENT

The Tax Court's finding of fact (R. 18–19), based upon the stipulation of facts on which the case was submitted (R. 13–17), are as follows:

Louis Solowey, the decedent, died on August 4, 1946. The estate tax return was filed with the Collector of Internal Revenue for the Second District of New York. (R. 18.) The decedent had taken out eight policies of life insurance on his own life, and on May 4, 1944, December 20, 1945, and December 29, 1945, assigned those policies to his wife and daughters. He had owned all of the incidents of ownership prior to the assignments but retained none after those assign-

ments. (R. 18.) The decedent paid all of the premiums on each policy up to the time of the assignment. Those premiums amounted to $80,954.31. The premiums on the policies subsequent to the assignments were paid by the assignees in a total amount of $7,116.90. None of the policies was surrendered by the assignees prior to the death of the decedent. The assignees received, upon the death of the decedent, total proceeds of the policies in the amount of $115,929.48. (R. 19.)

The transfers of the policies were shown in the estate tax return, but no part of the proceeds was included in the gross estate on that return. (R. 19.) The Commissioner, in determining the deficiency, included in the gross estate $105,622.87 purporting to represent an amount which bore the same ratio to the total insurance proceeds as the premiums paid by the decedent bore to the total premiums paid. It was stipulated that the correct figure to represent that ratio is $106,561.40. The Commissioner made claim for the increased deficiency in an amended answer filed at the hearing. (R. 19.)

The Tax Court sustained the Commissioner's determination. (R. 20.)

ARGUMENT

The deficiency asserted by the Commissioner of Internal Revenue arose through his inclusion

in the gross estate of the decedent for estate tax purposes of the proportion of the proceeds of life insurance in which the decedent possessed none of the incidents of ownership at the time of his death which the premiums the decedent had paid bore to the total cost of the insurance.

Section 811 (g) of the Internal Revenue Code (Appendix, *infra*, p. 11), as amended by Section 404 of the Revenue Act of 1942, provides that the value of the gross estate shall be determined by including such proportion of the proceeds of life insurance policies upon the decedent's life receivable by all beneficiaries other than his executor as the premiums or other consideration paid directly or indirectly by the decedent bear to the total premiums paid for the insurance. The same amending Act also restricted the application of this provision to the estates of decedents dying after October 21, 1942, the date of its enactment, and to the cases of decedents who retained incidents of ownership in such policies after January 10, 1941.

The decedent died after October 21, 1942, and he was still in possession of all of the incidents of ownership in he policies for some time after January 10, 1941. There is no doubt, therefore, that the facts of the case bring it within Section 811 (g) and, as the Tax Court stated in sustaining the deficiency determination (R. 20), the Commissioner correctly followed the provisions of the law. The answer to the first

question propounded by the taxpayer (Pet. 2) is a simple affirmative. To the extent indicated, the proceeds of the life insurance are includible in the decedent's gross estate by unmistakable statutory terms.

The petitioner's second question is apparently intended to attack Section 811 (g) as unconstitutional (Pet. 3, 8). Since the specific constitutional provisions alleged to be violated were not set forth in the pleadings, the Tax Court refused to consider the question (R. 20), adhering to its earlier decisions in *Dillon* v. *Commissioner,* 20 B. T. A. 690, and *Coca Cola Bottling* v. *Commissioner,* 22 B. T. A. 686. The Tax Court proceeded, however, to cite with apparent approval cases sustaining the validity of such a tax. Constitutional questions were raised only vaguely, if at all, before the Court of Appeals for the Second Circuit which affirmed the decision in a *per curiam* opinion entered June 25, 1951. (R. 24.)

This Court has stated that constitutional questions "are not to be entertained upon dubious presentations or, most certainly, when the presentation reasonably may be taken as not intended to put them forward squarely and inescapably," *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 763, nor will it normally consider points not raised in or decided by the federal court below (*Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481; *Helvering* v. *Wood,* 309 U. S. 344; *Owens* v.

Union Pacific R. Co., 319 U. S. 715. Cf. *United States* v. *Ballard,* 322 U. S. 78; *Fischer* v. *Amer. United Ins. Co.,* 314 U. S. 549). As was stated in *McGoldrick* v. *Compagnie Generale,* 309 U. S. 430, 434:

> * * * it is * * * the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. * * *

Assuming, *arguendo,* that the constitutional question is properly presented in the petition for certiorari and that it is of such nature as to invite consideration by the Court, we submit that the validity of Section 811 (g) is clear. Such a statute is entirely necessary and appropriate for preventing evasion of the estate tax by rendering ineffective certain transactions involving *inter vivos* transfers which constitute a substitute for testamentary dispositions. The integral part which insurance plays in the average testator's plans for the disposition of his property upon death gives it such a pronounced testamentary color as to distinguish it from other property. The premiums paid by the insured served to build up an estate for himself during life out of which those of his choice might be benefited at his death. The "mathematical

formula" to which objection is made (Pet. 4) is designed to include only that proportion of the total proceeds resulting from payments made by the insured during life in the erection of this part of his estate. Insofar as the insurance proceeds exceed the cash surrender value, they are enjoyable for the first time by the beneficiary at the death of the insured. Such a genuine enlargement of the beneficiary's rights is sufficient to support the tax in question.

The validity of the statutory provisions which require the inclusion in the estate of the decedent of the proceeds from life-insurance policies in which the decedent had relinquished all of the incidents of ownership prior to death, has been upheld by those courts that have considered the problem. *Bailey* v. *United States,* 27 F. Supp. 617 (C. Cls.); *Colonial Trust Co.* v. *Kraemer,* 63 F. Supp. 866 (D. Conn.). See also *Lang* v. *Commissioner,* 304 U. S. 264; *Chase Nat. Bank* v. *United States,* 116 F. 2d 625, 627 (C. A. 2d); *Helvering* v. *City Bank Co.,* 296 U. S. 85; *Heiner* v. *Donnan,* 285 U. S. 312, 324. Section 811 (c) which, in part, provides for the inclusion in the gross estate of the value of property transferred *inter vivos* in contemplation of death, has been sustained. *Milliken* v. *United States,* 283 U. S. 15. Since, in that situation, the transfer may have been completed during the donor's life and the donees realize no such increase in the value of

the property received at the death of the donor as occurs in the case of insurance, the imposition of estate tax in the instant case is *a fortiori* valid.

Section 810 of the Internal Revenue Code provides for the imposition of a tax upon the transfer of the net estate of every decedent. Section 811 (g), the only other section material to this case, includes as an element in the computation of the net estate, the value of certain property transferred *inter vivos* as a substitute for a testamentary disposition. The character of the tax imposed was not thereby changed. It remained a tax on the transfer of the net estate. Nothing in the decisions relied upon by petitioner (*Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Knowlton* v. *Moore,* 178 U. S. 41; *Goldstone* v. *United States,* 325 U. S. 687; *Fernandez* v. *Wiener,* 326 U. S. 340; *Commissioner* v. *Estate of Church,* 335 U. S. 632) suggests that the receipt of the proceeds of life insurance policies upon the life of the decedent and which were purchased with his funds cannot be made the basis for the imposition of a tax. As this Court stated in *Fernandez* v. *Wiener, supra,* at 353, "Receipt in possession and enjoyment is as much a taxable occasion within the reach of the federal taxing power as the enjoyment of any other incident of property." That case upheld the imposition of the federal estate tax to the entire community property upon the death of the hus-

band. So here, in addition to the inherently testamentary character of insurance, the fact that only upon the decedent's death did the assignees become entitled to receive the amount by which the face value of the policies exceeded their surrender values, is a sufficient basis for the imposition of the tax.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1951.